SUPREME COURT, U. S.

Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-320

BRANIFF AIRWAYS, INC.,

Petitioner,

v.

EL PASO COIN COMPANY, INC., and CONTINENTAL AIRLINES, INC.,

Respondents.

Petition for a Writ of Certiorari To The Court of Civil Appeals for The Eighth Supreme Judicial District of Texas

HAROLD L. SIMS,
SAM SPARKS,
DON HAGANS, II,
Of Counsel:
GRAMBLING, MOUNCE, DEFFEBACH, SIMS, HARDIE & GALATZAN,
P. O. Drawer 1977,
El Paso, Texas 79950,
Attorneys for Petitioner, Braniff Airways, Inc.

TABLE OF CONTENTS

	Page
Citation to Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes and Regulations	2
Statement	2
Reasons for Granting the Writ	
I. The Texas Court of Civil Appeals refused to apply controlling federal air freight tariff rules and regulations which set out the rights and liabilities of shippers and carriers	5
II. The Texas Court of Civil Appeals erroneously applied state commercial law in resolving the rights and liabilities of interstate shippers and carriers	7
III. The Texas Court of Civil Appeals improperly construed the nature and effect of existing federal air freight tariff rules and regulations	8
IV. The decision of the Texas Court of Civil Appeals should be reviewed due to its resultant effect on interstate air freight carriers	9
Conclusion	11
Certificate of Service	12
Appendix A	A-1
Appendix B	B-1
Appendix C	C-1
Appendix D	D-1
Appendix E	E-1

Page

Cases

Alco-Gravure Division of Publications Corp. v. American Airlines, Inc., 173 F. Supp. 752 (D. Md. 1959) 7

Blair v. Delta Air Lines, Inc., 344 F. Supp. 360 (S.D. Fla. 1972), *aff'd*, 477 F. 2d 564 (5th Cir. 1973) 6, 7, 9

Carter v. American Telephone & Telegraph Co., 365 F. 2d 486 (5th Cir.), *cert. denied*, 385 U.S. 1008 (1966) 6

Crosby & Co. v. Compagnie Nationale Air France, 76 Misc. 2d 990, 352 N.Y.S. 2d 75 (Sup. Ct.), *aff'd mem.*, 42 App. Div. 2d 1050, 348 N.Y.S. 2d 957 (1973), *motion for leave to appeal denied*, 33 N.Y. 2d 521, 353 N.Y.S. 2d 1025, 309 N.E. 2d 141, *cert. denied*, 416 U.S. 986 (1974) 8

Eighth Air Depot, Inc. v. Pan American World Airways, Inc., 254 So. 2d 564 (Fla. Dist. Ct. App. 1971) 5, 7

Farah Mfg. Co. v. Continental Airlines, Inc., Docket No. 6419 (Tex. Civ. App. — El Paso, June 18, 1975, writ filed) (not yet reported) 8

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) 10

Mao v. Eastern Air Lines, Inc., 310 F. Supp. 844 (S.D.N.Y. 1970) 7

Milhizer v. Riddle Airlines, Inc., 185 F. Supp. 110 (E.D. Mich. 1960), *aff'd*, 289 F. 2d 933 (6th Cir. 1961) 6

Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28 (1936) 10

Tishman & Lipp, Inc. v. Delta Airlines, 275 F. Supp. 471 (S.D.N.Y. 1967), *aff'd*, 413 F. 2d 1401 (2d Cir. 1969) 6, 7, 10

Page

Travelers Insurance Co. v. Delta Air Lines, Inc., 498 S.W. 2d 443 (Tex. Civ. App. — Texarkana 1973, no writ) 8

Vogelsang v. Delta Air Lines, Inc., 302 F. 2d 709 (2d Cir.), *cert. denied*, 371 U.S. 826 (1962) 9

Statutes and Miscellaneous Authorities

28 U.S.C. § 1257 2

49 U.S.C. § 1301 *et seq.* 2, 5, 6, 7, 10

§ 1321 2

§ 1324 ..... 2, 5

§ 1373 ..... 2, 5

14 C.F.R. § 221.3 5

§ 221.38 ..... 2, 6

§ 221.102 ..... 2, 6

Official Air Freight Rules Tariff No. 1-B, "Rules and Regulations," C.T.C.(A) No. 39, C.A.B. No. 96 ..... 2, 6

Rule 2 ..... 2, 3, 6

Rule 23(B) 2, 6, 9

Rule 26(F) 2, 3, 6, 9

Rule 30(B) 2, 6, 9

Rule 34 ..... 2, 6, 9

Tex. Bus. & Comm. Code Ann. 4, 7

Section 1.201(6) 4

Section 7.302 ..... 4, 7

Section 7.403 7

Tex. R. Civ. P. 467 and 484 2

Note, *Transporting Goods by Air*, 69 Yale L.J. 993 (1960) 5

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas entered in the above-entitled case.

CITATION TO OPINIONS BELOW

The findings of fact and conclusions of law and the judgment rendered by the District Court of El Paso County, Texas, 120th Judicial District, appear in Appendix A, *infra*. The opinion of the Texas Court of Civil Appeals is reported in 517 S.W. 2d 915 and appears in Appendix B, *infra*. The order of the Texas Supreme Court refusing Petitioner's application for writ of error and its order overruling Petitioner's motion for rehearing appear in Appendix C, *infra*.

JURISDICTION

The judgment of the Texas Court of Civil Appeals was entered on December 31, 1974, and rehearing was denied on January 29, 1975. Petitioner's application for writ of error to the Texas Supreme Court was denied on May 7, 1975, and Petitioner's motion for rehearing was denied on June 4, 1975. *See* TEX. R. CIV. P. 467 and 484. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the federal air freight tariff rules and regulations set out and control the respective rights and liabilities of shippers and carriers in interstate air freight transactions.

STATUTES AND REGULATIONS

The following statutes and regulations appear in pertinent part in Appendix D, *infra*.

1. The pertinent federal statutes are 49 U.S.C. §§ 1321 (a)(1), 1324(a) and 1373(a).
2. The pertinent regulations of the Civil Aeronautics Board are 14 C.F.R. §§ 221.38(a) and 221.102.
3. The pertinent provisions of the Official Air Freight Rules Tariff No. 1-B, "Rules and Regulations," C.T.C. (A) No. 39, C.A.B. No. 96 are Rules 2, 23(B), 26(F), 30(B)(1)(b), 30(B)(1)(c) and 34 [in effect December 18, 1972].

STATEMENT

This is an interstate air freight shipment and loss case. Respondent El Paso Coin Company was the shipper; Respondent Continental Airlines, Inc. (hereinafter "Continental") was the initial carrier; and Petitioner Braniff Airways, Inc. (hereinafter "Braniff") was the connecting and terminal carrier.

On December 18, 1972, El Paso Coin Company delivered to Continental at the El Paso International Airport three

five-gallon paint cans containing gold coins. Each can was a shipment of extraordinary value under the air freight tariff. Tariff Rule 2, *supra*. Three rapid airbills were prepared with the listed destination of LaGuardia Airport in New York. Contrary to the tariff requirements, El Paso Coin Company made no advance arrangements with Continental. Tariff Rule 26(F), *supra*.

Continental transported the shipments to Dallas, Texas, where they were delivered to Braniff as regular air freight. Continental also made no advance arrangements. *See* Tariff Rule 2, *supra*. Braniff's supervisory personnel, not being alerted by any advance arrangements of the extraordinary value of the shipments, did not initiate special handling and security procedures. As that day's flights to LaGuardia had already departed, the shipments were loaded as regular air freight on a flight to Kennedy Airport.[1] Braniff provided regular ground freight transportation between the two New York airports.

At Kennedy Airport, Braniff's air freight manager received two of the shipments. The third was missing.

El Paso Coin Company sued Continental and Braniff for the value of the missing shipment in the District Court of El Paso County, Texas. The trial court concluded that both Continental and Braniff had *waived* the advance arrangements rule of the air freight tariff. This conclusion was in direct contravention of Rule 26(F) of the tariff, which expressly stated that tariff provisions could *not* be waived or modified.[2] After finding waiver, the trial court ignored the tariff rules and held Braniff negligent in rerouting and failing to deliver the shipment. El Paso Coin Company was awarded recovery of the value of the shipment, plus interest,

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[1] If special handling procedures had been initiated, the shipments would have been met in Dallas by a Braniff supervisor, kept overnight under security and sent directly to LaGuardia Airport the next day on a non-stop flight.

[2] Rule 26(F) reads in pertinent part as follows: "[N]o agent, servant or representative of the carrier has authority to alter, modify or *waive* any provision of the contract of carriage or of this tariff." [Emphasis supplied].

and Braniff was ordered to indemnify Continental. Prior to appeal, Continental paid the judgment and became the assignee of El Paso Coin Company's rights and interest.

The Texas Court of Civil Appeals sidestepped the specific findings and conclusions of the trial court. It stated the waiver question to be "academic," determining that "the failure to comply with the tariff did not relieve Braniff of liability." According to the Court of Civil Appeals, "If the waiver would not affect the outcome, it matters not whether there could be or was such a waiver." 517 S.W. 2d at 918. The Court of Civil Appeals held that there were no controlling federal tariff regulations,[3] that the Texas Uniform Commercial Code controlled the rights and liabilities of the parties,[4] and that Braniff failed to establish tariff violations as the "sole proximate cause" of the loss.[5]

The Texas Supreme Court refused Braniff's writ application, which challenged each of the foregoing elements of the Court of Civil Appeals' opinion, finding no reversible error.

A summary of pleading excerpts and points of error specifying at what stage and in what manner a federal question was raised appears in Appendix E, *infra*.

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[3] The Court of Civil Appeals stated that "in this particular area as to air carriers there is *no* Federal regulation setting out the rights and liabilities between shipper and carrier and connecting carriers nor is it spelled out in the tariffs." 517 S.W. 2d at 916 [emphasis supplied].

[4] The Texas Uniform Commercial Code, according to the Court of Civil Appeals, "is controlling of the matters presented in this case." 517 S.W. 2d at 917. Pursuant to Section 7.302, Tex. Bus. & Comm. Code Ann., Continental, as the issuer of the bill of lading [which includes an airbill under Section 1.201(6)], was liable to El Paso Coin Company, and the issuer was entitled to recover in turn from the connecting carrier, Braniff, because the loss occurred while the shipment was in its possession.

[5] The court noted that, a *prima facie* case having been made by means of the Commercial Code, Braniff could escape liability only through excuse. Braniff's "tariff-violation excuse" required proof that such violation was the "sole proximate cause" of the loss, said the court, and this burden was not met. 517 S.W. 2d at 917.

REASONS FOR GRANTING THE WRIT

A question vital to interstate air freight carriers and to the supremacy of federal law in a preempted area is presented. The Federal Aviation Act and rules and regulations promulgated by the Civil Aeronautics Board control the rights and liabilities of shippers and carriers in interstate air freight transactions. A state appellate court has ignored and blatantly refused to apply these federal rules and regulations and has instead utilized state commercial law in resolving liability. This precedent is dangerous and deprives air freight carriers of substantive federal rights which a state court is bound to protect. This precedent directly conflicts with existing federal decisions and raises a federal question requiring immediate review.

I.

THE TEXAS COURT OF CIVIL APPEALS REFUSED TO APPLY CONTROLLING FEDERAL AIR FREIGHT TARIFF RULES AND REGULATIONS WHICH SET OUT THE RIGHTS AND LIABILITIES OF SHIPPERS AND CARRIERS.

The court below stated that there is "no federal regulation *setting out* the rights and liabilities between shipper and carrier." 517 S.W. 2d at 916 [emphasis supplied]. No assertion could be further from fact.

In accordance with the Federal Aviation Act, the Civil Aeronautics Board is empowered to promulgate rules and regulations. 49 U.S.C. § 1324(a).[6] Rules and regulations pertaining to actual transportation are drafted by carriers, but filed with and approved by the Board. 49 U.S.C. § 1373(a); 14 C.F.R. § 221.3(a). Such rules and regulations contain provisions that "remove all doubt as to their application" and are published in a single tariff. *See* 14 C.F.R.

[6] The Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et. seq.*, governs air transportation in interstate, and to some degree, intrastate commerce. *Eighth Air Depot, Inc. v. Pan American World Airways, Inc.*, 254 So. 2d 564, 565 n.1 (Fla. Dist. Ct. App. 1971); *see also* Note, *Transporting Goods by Air*, 69 Yale L.J. 993 (1960).

§§ 221.38(a)(1) and 221.102; Official Air Freight Rules Tariff No. 1-B, "Rules and Regulations," C.T.C.(A) No. 39, C.A.B. No. 96 [in effect December 18, 1972].

The applicable tariff speaks specifically to "articles of extraordinary value" and acceptance of such articles "provided that advance arrangements are made." Tariff Rules 2 and 23(B), *supra*. No agent of the carrier has the authority to "modify or waive any provision" of the tariff. Tariff Rule 26(F), *supra*. Under the tariff provisions, the shipper "shall be liable" to "indemnify the carrier" for damages suffered "by reason of *any* violation of any of the rules" by the shipper. Tariff Rule 34, *supra* [emphasis supplied]. A carrier is also relieved of liability if the damage results from the default of the "consignor." Tariff Rules 30(B)(1)(b) and (c), *supra*. The foregoing provisions, *inter alia*, do *set out* succinctly the rights and liabilities of shippers and carriers. Official Air Freight Rules Tariff No. 1-B, *supra*.

Federal courts have had no difficulty in applying the air freight rules tariff. *See Blair v. Delta Air Lines, Inc.*, 344 F. Supp. 360 (S.D. Fla. 1972), *aff'd*, 477 F. 2d 564 (5th Cir. 1973). To the contrary, federal courts have held that a tariff, required by law to be filed, constitutes the law and is not merely a contract. *See Carter v. American Telephone & Telegraph Co.*, 365 F. 2d 486, 496 (5th Cir.), *cert. denied*, 385 U.S. 1008 (1966). Tariff provisions strictly govern freight loss or damage. *Milhizer v. Riddle Airlines, Inc.*, 185 F. Supp. 110 (E.D. Mich. 1960), *aff'd*, 289 F. 2d 933 (6th Cir. 1961). Tariff provisions accepted by the Civil Aeronautics Board may contain exculpatory clauses and limitations of liability for loss or damage, regardless of fault. Such provisions are not prohibited by the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq. Tishman & Lipp, Inc. v. Delta Airlines*, 275 F. Supp. 471, 475 (S.D.N.Y. 1967), *aff'd*, 413 F. 2d 1401 (2nd Cir. 1969).

In sum, the "established rule" in the federal courts is that provisions of the air freight tariff "conclusively and exclusively govern the rights and liabilities between the

parties." *Mao v. Eastern Air Lines, Inc.*, 310 F. Supp. 844, 846 (S.D.N.Y. 1970); *see also Alco-Gravure Division of Publications Corp. v. American Airlines, Inc.*, 173 F. Supp. 752, 755 (D. Md. 1959). Courts in other states have followed this rule and have found the provisions of the Federal Aviation Act and the tariff sufficiently explicit to warrant recognition and enforcement. *Cf. Eighth Air Depot, Inc. v. Pan American World Airways, Inc., supra* n. 6.

The holding of the court below maintaining the nonexistence of a federal tariff *setting out* the rights and responsibilities of shippers and carriers is totally in error.

II.

THE TEXAS COURT OF CIVIL APPEALS ERRONEOUSLY APPLIED STATE COMMERCIAL LAW IN RESOLVING THE RIGHTS AND LIABILITIES OF INTERSTATE SHIPPERS AND CARRIERS.

The court below stated that the Texas Uniform Commercial Code was "controlling of the matters presented in this case." 517 S.W. 2d at 917; *see* Tex. Bus. & Comm. Code Ann. §§ 7.302 and 7.403. No authority was cited in support of this holding; no such authority can be found.

Patently, federal law governs the resolution of rights and liabilities in interstate air freight transactions. *Blair v. Delta Air Lines, Inc., supra; Tishman & Lipp, Inc. v. Delta Airlines, supra.* Rather than applying such law, the court below amazingly utilized state commercial law to place ultimate liability upon Braniff! This clearly erroneous application of state commercial law in a case demanding enforcement of federal rules and regulations was not only in derogation of Braniff's rights as a licensed carrier, but was a deliberate circumvention of the intent and letter of the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* This court should not permit such a holding to stand.

III.

THE TEXAS COURT OF CIVIL APPEALS IMPROPERLY CONSTRUED THE NATURE AND EFFECT OF EXISTING FEDERAL AIR FREIGHT TARIFF RULES AND REGULATIONS.

The court below, relying on the rationale of *Travelers Insurance Co. v. Delta Air Lines, Inc.*, 498 S.W. 2d 443 (Tex. Civ. App. — Texarkana 1973, no writ), construed the applicable tariff provisions so as to require Braniff to establish what was termed its "tariff-violation excuse" through a showing of "sole proximate cause." 517 S. W. 2d at 917-18.

Without citing specific tariff rules, the Texas Court of Civil Appeals in *Travelers* stated that a carrier, in order to escape liability on the basis of an act or omission of the shipper, would have to show that the act of the shipper was the "sole proximate cause" of the loss or failure to deliver. 498 S.W. 2d at 446. According to that court, "Any [further] attempt by the carrier to restrict its liability in this regard by provisions in the * * * tariff [would be] against public policy and void." *Id. Travelers* and the instant case point the direction being taken by the Texas courts and demonstrate the need for immediate review.[7]

A tariff provision in effect on the date of shipment *cannot* be judicially questioned on the basis of reasonableness or public policy, as that issue is within the primary jurisdiction of the Civil Aeronautics Board. *Crosby & Co. v. Compagnie Nationale Air France*, 76 Misc. 2d 990, 352 N.Y.S. 2d 75, 82-83 (Sup. Ct.), *aff'd mem.*, 42 App. Div. 2d 1050, 348 N.Y.S. 2d 957 (1973), *motion for leave to appeal denied*, 33 N.Y. 2d 521, 353 N.Y.S. 2d 1025, 309 N.E. 2d 141, *cert. denied*, 416 U.S. 986 (1974). Administrative remedies must first be exhausted before any judicial determination can be made. *Crosby & Co. v. Compagnie Nationale Air France*,

[7] The Texas Court of Civil Appeals, in the recent case of *Farah Mfg. Co. v. Continental Airlines, Inc.*, Docket No. 6419 (Tex. Civ. App. — El Paso, June 18, 1975, writ filed) (not yet reported), similarly held an express air freight tariff requirement regarding written notice of claim to be unreasonable under the circumstances and, therefore, waived. This refusal to follow federal law parallels the course taken in *Travelers* and the instant case.

supra; see also Vogelsang v. Delta Air Lines, Inc., 302 F. 2d 709 (2d Cir.), *cert. denied*, 371 U.S. 826 (1962).

Thus, existing tariff provisions cannot be tested by Texas common law standards of causation and, if found wanting, discarded. A "sole proximate cause" standard has never been present in the Official Air Freight Rules Tariff. *See* Tariff Rules 30(B) (1) (b) and (c), *supra*. Yet, under the decision below and the earlier *Travelers* precedent, interstate air carriers operating in Texas are required to plead and prove such a standard to preclude liability at trial. Had this strict burden not been imposed, a different result would have been reached.

Furthermore, the Texas courts in this case not only failed to give effect to the clear meaning of Tariff Rule 26(F), prohibiting waiver, but totally ignored it.[8] If Tariff Rules 23(B), 26(F) and 34 were given effect, as intended by Congress and the Civil Aeronautics Board, the ultimate conclusion of the trial court and Texas Court of Civil Appeals regarding liability could not have been reached. Indeed, the tariff requirements were specifically designed to prevent the precise situation existing in this case.[9]

IV.

THE DECISION OF THE TEXAS COURT OF CIVIL APPEALS SHOULD BE REVIEWED DUE TO ITS RESULTANT EFFECT ON INTERSTATE AIR FREIGHT CARRIERS.

Public policy favors the right of an air carrier to determine its rates according to the risk assumed. *Blair v. Delta Air*

[8] Waiver was the sole basis of the trial court's judgment. The Court of Civil Appeals expressly ignored Rule 26(F) and Rule 34, which speaks to violation of "any of the rules" by a shipper or other party and the resultant legal effect.

[9] It is undisputed, from the trial record, that the purpose of these tariff requirements was to give the air carrier knowledge that a high-value shipment was coming and to afford the carrier an opportunity either to refuse the shipment or to arrange appropriate security and handling by qualified personnel. *See* Tariff Rules 23(B) and 26(F), *supra*. It is likewise clear from the record that these exact tariff requirements were specifically promulgated to prevent high-value shipments from being forwarded to Kennedy Airport, which has a "horrible reputation" for pilferage and theft, without advance security arrangements. *Id.*

Lines, Inc., 344 F. Supp. 360, 367 (S.D. Fla. 1972), *aff'd*, 477 F. 2d 564 (5th Cir. 1973). This is an "underlying principle" in public carrier legislation. *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28, 29 (1936). The Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, effectuates this principle.

The Civil Aeronautics Board and the air freight carriers control risk in substantial part by the Official Air Freight Rules Tariff which governs rights and liabilities. *Tishman & Lipp, Inc. v. Delta Airlines, supra.* If the state courts do not apply and enforce tariff rules and regulations as written then, contrary to the intent and purpose of the Federal Aviation Act, there is an obvious uncontrolled increase in risk.

This Court's opinion in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), has substantial relevance to this petition. As did *Garrett*, the instant case involves concurrent jurisdiction. Mr. Justice Black, writing for the Court under similar circumstances, said:

> "The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress * * * intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended by the jurisdiction in which the right itself originates * * *. *So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a [reviewable] federal question* * * *." *Id.* at 245 [emphasis supplied].

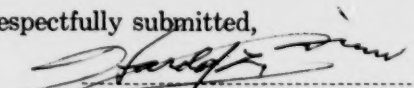
The fine balance of rates versus risk must be maintained. The encroachment by Texas state courts into a federally preempted area must be strongly repudiated. Otherwise,

the significant rule-making rights granted the Civil Aeronautics Board and the air freight carriers by statute will have been rendered meaningless.

CONCLUSION

The Texas Court of Civil Appeals failed to apply federal law, depriving Braniff of a proper resolution of the parties' rights and liabilities. Texas precedent is inconsistent with federal decisions and imposes an unconscionable burden on interstate air freight carriers. This Petition for Writ of Certiorari should be granted and the decision below promptly reversed.

Respectfully submitted,



HAROLD L. SIMS,
SAM SPARKS,
DON HAGANS, II,
Of Counsel:
GRAMBLING, MOUNCE,
DEFFEBACH, SIMS, HARDIE &
GALATZAN,
P. O. Drawer 1977,
El Paso, Texas 79950,
Attorneys for Petitioner,
Braniff Airways, Inc.

CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner, Braniff Airways, Inc., hereby certifies as follow:

(a) that I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown;

(b) that the names and addresses of the attorneys of record for each of the adverse parties are as follows:

> William B. Duncan, P.O. Drawer 2800, El Paso, Texas 79999; attorney for Continental Airlines, Inc., as an entity, and as assignee of the rights and interest of El Paso Coin Company;
>
> Norman N. Rosen, 809 El Paso National Bank Building, El Paso, Texas 79901; original attorney for El Paso Coin Company;

(c) that on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said William B. Duncan and the said Norman N. Rosen, attorneys for said Respondents, by depositing same in the United States post office in El Paso, Texas, with first class postage prepaid, properly addressed to said attorneys for Respondents at their said adresses.

EXECUTED this the 26 day of August, 1975.

Attorney for Petitioner, Braniff Airways, Inc.